



## **Federal Court Decisions Involving Electronic Discovery January 1, 2012 – June 30, 2012**

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**Annex Books, Inc. v. City of Indianapolis, 2012 WL 892170 (S.D. Ind. Mar. 14, 2012).** The defendant obtained an order compelling production of the plaintiffs' bookkeeping data. Although the plaintiffs delivered discs that were supposed to contain the data, the discs were unreadable. Forensic computer experts hired by the plaintiffs tried unsuccessfully to migrate the data into a reasonably usable form. The plaintiffs argued that further efforts to obtain the data would be unduly burdensome, while the defendant countered that it was entitled to the data. The district court affirmed its order compelling production, as the defendant had a right to the plaintiffs' data in a reasonably usable form if it was recoverable. However, the court supplemented its order, requiring the defendant to pay future costs associated with additional attempts to import the data. The court found that the plaintiffs had made a good faith effort by obtaining the services of two computer forensic services, spent at least \$9,500 for over thirty hours of work, purchased QuickBooks Pro, and still were not able to import the data. However, the defendant offered no alternative to obtaining the data, and therefore must assume any further costs.

**Amron International Diving Supply, Inc. v. Hydrolinx Diving Comm'n, Inc., et al., 11-CV-1890-H (S.D. Cal. Feb. 12, 2012).** In this trade secrets case, the plaintiff moved for \$73,100.15 in monetary sanctions for discovery misconduct. The court adopted the Magistrate Judge's recommendation and awarded such sanctions. Additionally, the court found that the defendants in contempt for violating a court order to preserve ESI. The court reasoned that the defendants "manipulated the computer system clock to make it appear as though the hard drive had been installed" earlier; that defendants used digital document shredder to destroy evidence; and that the defendants failed to comply, and affirmed that they had complied, with previous orders.

**Aviva USA Corp. v. Vazirani, 2012 WL 71020 (D. Ariz. Jan. 10, 2012).** In this insurance marketing dispute, the plaintiff filed an action against the defendants for unfair

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trade practices and trademark infringement, and moved for entry of partial final judgment on liability as sanctions for spoliation of evidence. The defendants argued that they did not destroy evidence, that the plaintiffs had the emails and texts that the plaintiffs claim had been destroyed, and that the plaintiffs had enough information to prosecute the case. The court determined that defendants had a duty to preserve the evidence in question, had acted in bad faith in failing to preserve evidence, and that failure prejudiced the plaintiff, thus establishing spoliation. However, the court agreed in part with the defendant that the plaintiff still had evidence to pursue its claims, and therefore limited the sanction to an adverse inference. As an aside, the defendants counter-moved for discovery sanctions, citing damage to their computers while in the possession of the plaintiff's forensic expert. The court found that the defendant was seeking a sanction for damage to property during the discovery process, not a sanction for an abuse of discovery. These two situations, according to the court, were not equivalent, and the court denied the defendants' counter motion.

**Bourne v. Arruda, 2012 WL 1570831 (D.N.H. May 3, 2012), reconsideration denied in part, 2012 WL 2891099 (D.N.H. July 16, 2012).** In this defamation action, the plaintiff charged the defendants with discovery abuse and spoliation of electronic evidence. The plaintiff requested the appointment of a computer expert, at the defendants' expense, to locate missing files from the defendants' personal computers, work computers, and "all computer records, hard drives, backup servers, online providers, and/or any other electronic retention methods." As justification for "carte blanche access," the plaintiff pointed to other documents he had uncovered on his own, as well as the defendants' failure to timely produce documents in a previous suit. The defendants argued that the plaintiff had failed to show good cause or need for access to the files. The court found insufficient evidence to support an allegation of discovery abuse and that the defendants' conduct in previous lawsuits was irrelevant to the case at bar.

**Brigham Young University v. Pfizer 2012 WL 1302288 (D. Utah Apr. 16, 2012).** In a hotly contested patent dispute, plaintiff BYU obtained sanctions against defendant Pfizer for failures in discovery, including monetary sanctions amounting to \$852,315.80 for what the court characterized as "conduct [that] had not risen to a level of willful and intentional disobedience, but [had] been negligent to the point that it closely approach[ed] a finding of bad faith." Discovery resumed, and in due course the plaintiff moved for further sanctions, including issue preclusion, exclusion of certain evidence, and an adverse inference jury instruction, claiming that Pfizer lost or destroyed documents, and that Pfizer's records' management practices are unreasonable and have made relevant documents practically inaccessible. This time, the Court declined to issue further sanctions on two grounds. First, it found that "overall, the conduct of Pfizer following the Court's entry of its prior sanctions order, has improved. Indeed, there have been times when an actual spirit of cooperation existed among the parties and counsel." Second, the court found that Pfizer's poor records management practices did not rise to the level of bad faith necessary to justify the sanctions BYU sought. Distinguishing this case from *Philip Adams*, decided in the same district, the court refused to move the trigger date for the duty of preservation back to 1992, as requested by the plaintiff. "Clearly there is a

duty on a party to preserve evidence when it is anticipating litigation, yet such a duty cannot prevent the inadvertent destruction or misplacement of evidence that can occur before such a duty arises.... Evidence may simply be discarded as a result of good faith business procedures.... While the discovery process has been far from perfect, there is nothing before the Court indicating a willful or blatant attempt by Pfizer to hide or destroy evidence after the entry of the October 2009 sanctions order.”

**Bull v. United Parcel Service, Inc., 2012 WL 10932 (3<sup>rd</sup> Cir. 2012).** In this appeal from terminating sanctions, Bull argued that the court abused its discretion by dismissing the state law employment discrimination claim for failing to produce original medical notes. The court noted that, as a preliminary matter, the failure to produce original documents that contained unique data may give rise to spoliation. However, the court declined to find spoliation in this case. The court reasoned that the plaintiff did not take sufficient steps to attain originals, including filing a motion to compel or a specific request for production; that UPS did not intentionally withhold these documents, that the copies contained the same information as the original, and that the copy of the medical record could be authenticated through other documents.

**Calvert v. Red Robin Int’l, Inc., 2012 WL 1668980 (N.D. Cal. May 11, 2012).** The defendant in this putative class action moved for sanctions related to the plaintiff’s failure to produce Facebook communications. Plaintiff’s counsel asserted that he had overseen his client’s searches of Facebook content per court orders, but he acknowledged that he did not have a good understanding of the social media site and took the plaintiff at the plaintiff’s word when he claimed to have produced communications. The district court granted the defendant’s motion in part, finding that the plaintiff’s failure to produce Facebook data was “willful, in bad faith, and the result of a lack of due diligence.” The district court ordered the plaintiff to pay defendant sanctions in the amount of \$15,985, and disqualified the plaintiff as class representative. It reserved judgment on whether to sanction the plaintiff’s attorney as well, “but instead will wait to see if similar lapses occur in the continuing conduct of the case.”

**Cannata v. Wyndham Worldwide Corp., et al, 2011 WL 3495987 (D. Nev. Aug 10, 2011).** Plaintiffs assert seventeen causes of action in this litigation related to gender, employment, and sexual discrimination. In this discovery decision, the court found that the litigation hold itself was protected by attorney client privilege, however, the facts regarding the hold (i.e. to whom it was sent and the categories of ESI to be preserved) should be disclosed. Subsequently, in **2011 WL 5854658 (D. Nev. Nov. 17, 2011)**, in responding to a motion to compel, the court found that the parties failed to any meaningful meet and confer regarding the existing motion to compel. As a result, the court ordered the parties to meet about the discoverability and relevance of the requested documents. The court also noted that “if parties are unable to resolve an issue, defendants shall provide a list of responsive documents that they are refusing to produce, and file a motion for protective order within thirty days.” With respect to other motions, the court allowed discovery into these matters to remain confidential, granted a motion for sanction against the client (\$5,000) and law firm (\$2,500) for having to file a motion to quash third party subpoenas, and ordered that relevant documents produced within

fourteen days after this order. Further, in **2012 WL 528224 (D. Nev. Feb. 17, 2012)**, plaintiffs asserted that the court's proposed keyword search protocol was too narrow. The defendants asserted that the proposed number of search terms and custodians was overly broad, unfeasible and inappropriate. The court provided a good discussion of search term best practices and found that search term relating to a sexual conduct were relevant to its claim of sexual discrimination. The court then limited the number of search terms, concluding that if "the court finds that the final search terms in sites exceeds 40, for each additional search term or site, the plaintiffs will reimburse defendants for 5% o their e-Discovery compliance costs [up to 50%] from the date of this order through the end of discovery." The court also found that appointment of a special master was appropriate.

**Ceglia v. Zuckerberg, 2012 WL 1392965 (W.D.N.Y. Apr. 19, 2012), reconsideration denied, 2012 WL 1445089 (W.D.N.Y. Apr. 26, 2012), aff'd, 2012 WL 3527935 (W.D.N.Y. Aug. 15, 2012).** In this contract dispute, the plaintiff claimed that its information technology expert had mistakenly produced a privileged email to the digital forensic consulting firm retained by the defendants. Thereafter, the recipient consulting firm disseminated the email in its native format to all parties involved in the litigation. Over two months later, the plaintiff claimed that the email had been inadvertently produced and requested it be returned or destroyed. The defendants countered that the plaintiff had failed to comply with Evidence Rule 502(b). They also argued that the requested emails did not appear to contain legal advice. Finding that the plaintiff neither took reasonable steps to prevent the email's disclosure nor acted promptly to remedy the error upon its discovery, the court held that any claimed privilege had been waived.

**Chura v. Delmar Gardens of Lenexa, Inc., 2012 WL 940270 (D. Kan. Mar. 20, 2012).** The plaintiffs in this employment discrimination action moved to compel the defendant to search for and produce ESI. The plaintiffs asserted that in similar lawsuits involving a large corporate entity, typical production would include e-mails between managers and witnesses regarding the plaintiffs' complaint, reports to and from the corporate office, and investigation notes compiled by human resources employees. In contrast, the defendant in this case had not produced any written complaints, e-mails, or phone logs. The defendant maintained that it could not produce emails that did not exist. The court was not convinced by the defendant's argument, finding it "questionable" that none of its investigating employees had exchanged e-mail or other written correspondence on the matter. Finding insufficient evidence to issue a ruling regarding the defendant's preservation and search methods, the court ordered "an evidentiary hearing regarding Defendant's efforts to preserve and search for ESI responsive to Plaintiffs' interrogatories and requests for production."

**Custom Hardware Engineering & Consulting, Inc. v. Dowell, 2012 WL 10496 (E.D. Mo. Jan. 3, 2012).** In this copyright infringement and breach of contract dispute, the defendant objected to the proposed search terms. The court examined the keyword search protocols and allowed certain keywords proposed by the plaintiffs. The court explained that the defendant's keyword search protocol was "problematic and inappropriate" because it "limits the amount of responsive information produced in the search." In dicta, the court acknowledged that it was not in a good position to craft a keyword searches,

and, for that reason, the court cautioned the parties to “attempt with more civility to resolve similar disputes in the future through agreement or other means.” In a subsequent decision, **2012 U.S. Dist LEXIS 5665 (E.D. Mo. Jan 18, 2012)**. The court considered the plaintiffs’ motion for sanctions after the plaintiffs’ expert found data-wiping software on the defendant’s computer. The court ordered that the computer expert examine previously-created mirror images of the hard drive to determine if the data wiping software was present on the mirror image duplicate and report to the court. The court also ordered each party to pay for half of the forensic examination.

**Da Silva Moore v. Publicas Groupe SA, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).** In a discrimination case filed against an advertising conglomerate, the plaintiffs challenged the defendants’ proposed e-discovery protocol, which included predictive coding, defined as a method of computer-assisted document review that uses sophisticated algorithms to enable the computer to assign relevance to documents based on interaction with a human reviewer. The Magistrate Judge recognized that in large-volume cases in which parties face significant potential costs for document review, computer-assisted document review was an acceptable way to search for relevant ESI. In this case, the court found that predictive coding was appropriate because (1) the parties’ agreement to use technology-assisted review, (2) the vast amounts of ESI to be reviewed (over three million documents), (3) the superiority of computer-assisted review compared to the available alternatives (i.e., linear manual review or keyword searches), (4) the need for cost effectiveness and proportionality under Rule 26(b)(2)(C), and (5) the transparent process proposed by defendants. The court suggested that best approach to using computer-assisted coding and surviving a challenge by opposing party, was “to follow the Sedona Cooperation Proclamation model,” which the court “strongly endors[ed].” The Magistrate Judge held that “counsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and process relevant ESI while adhering to Rule 1 and Rule 26(b)(2)(C) proportionality. Computer-assisted review can now be considered judicially-approved for use in appropriate cases.” The court reasoned that Rule 26(g) incorporates Rule 26(b)(2)(C)’s proportionality principle; that Rule 702 and the *Daubert* standards do not apply to the discovery process, because “[t]he admissibility of specific emails at trial will depend on the email itself . . . not how it was found during discovery”; and that any concerns about the emails’ relevance was premature at this point. On appeal, **2012 WL 1446534 (S.D.N.Y. Apr. 25, 2012)**, the District Judge adopted the Magistrate Judge’s orders and concluded that “under the circumstances of this particular case, the use of the predictive coding software as specified in the ESI protocol is more appropriate than keyword searching. The Court does not find a basis to hold that [the Magistrate Judge’s] conclusion is clearly erroneous or contrary to law.”

**Danny Lynn Elec. v. Veolia Es Solid Waste, 2012 WL 786843 (M.D. Ala. Mar. 9, 2012), *aff’d sub nom.* Danny Lynn Elec. & Plumbing, LLC v. Veolia Es Solid Waste Se., Inc., 2012 WL 1571314 (M.D. Ala. May 4, 2012).** The plaintiffs moved for spoliation sanctions, accusing the defendants of disregarding their duty to implement a litigation hold to preserve ESI. They alleged that the defendants deleted nine custodians’ email accounts and failed to prevent the email auto-delete function, which deleted emails

that remained in a trash folder more than ten days. The magistrate judge determined that the defendants had not acted in bad faith and had a reasonable litigation hold policy in place. According to the magistrate judge, the plaintiffs had suffered minimal harm, if any, as any missing emails could be retrieved from backup media. The district court affirmed the magistrate judge's decision, finding that even if spoliation had occurred, the court was still not convinced that bad faith existed. However, the district court disagreed with the magistrate judge's requirement that the plaintiffs show the contents of the deleted emails to demonstrate prejudice.

***In re Delta/Airtran Baggage Fee Antitrust Litigation*, 2012 WL 360509 (N.D. Ga. Feb. 3, 2012).** In this antitrust litigation, the plaintiffs asserted that several companies conspired to fix airline bag fees. The court described in detail Delta's computer backup procedures, which were administered by IBM, and Delta's litigation hold procedures in response to an initial Department of Justice inquiry. The court found that Delta had promptly notified individual custodians of the litigation hold and instructed them on appropriate preservation steps, but the plaintiffs claimed that Delta failed to copy all relevant files on the custodians' hard drives and failed to notify IBM to halt routine backup media rotation for some four months. Despite strenuous initial denials that any relevant data had been lost, the defendants, through an unrelated investigation, discovered that they had not produced 60,000 pages of responsive documents including information on the un-checked hard drives and documents on back-up tapes. As a result, plaintiffs sought to re-open discovery and order sanctions against defendants under rule 26(g). The court found that Delta "did not conduct a reasonable inquiry" under 26(g) and reasoned that Delta did not confirm that the hard drives that were to be run through the software program were actually run through the same program. The court ordered the defendants to pay the reasonable costs and attorneys fees incurred as a result failure to preserve and produce relevant evidence.

***E.E.O.C. v. Fry's Electronics, Inc.*, 2012 WL 1642305 (W.D. Wash. May 10, 2012).** The EEOC brought an action against the defendant employer alleging discriminatory and retaliatory employment practices, and the affected employees were permitted to intervene. The EEOC moved for sanctions, accusing the defendant of willful spoliation of evidence and failure to appear for a deposition. The defendant admitted that it had destroyed two hard drives, but argued that the hard drives did not contain any unique information that had not been separately preserved by its corporate headquarters. The district court held that the defendant's failure to preserve relevant evidence and its destruction of computer hard drives warranted sanction for spoliation. The court reasoned that the defendant had offered no justification for the destruction of the computers, nor provided any evidence that the computers had been replaced based on a planned schedule or company-wide upgrade. Further, the defendant had not mirrored or otherwise transferred the contents of a hard drive to another medium for preservation or shown that all documents sent to headquarters had actually been preserved. Finally, there was no evidence that "drafts of documents (including personnel documents), notes, informal communications, investigative documents, or documents related to issues that were handled at the local level were sent to corporate headquarters." Thus, the court allowed the EEOC "considerable leeway in arguing what information might have been gleaned

from the computer hard drivers [sic] that were destroyed.”

**E.E.O.C. v. Sterling Jewelers Inc., 2012 WL 1680811 (W.D.N.Y. May 14, 2012).** In this gender discrimination action brought by the EEOC against defendant employer, the parties were directed to file motions to address several unresolved discovery issues. The employer argued, among other things, that the EEOC had not produced any emails in response to the employer’s ESI requests and had, instead, produced “only a handful of documents that appear to be print-outs from databases.” The EEOC claimed its policy was to maintain files in paper format; consequently, all emails had been printed and placed in files. Additionally, the EEOC claimed that most of its investigators communicated by mail and such communications had been produced. Although the court could not determine whether the EEOC had actually searched its ESI for responsive documents, it declined to order the EEOC to search its files to confirm that all ESI had been included in the paper files. The court added, however, that the defendant could seek court intervention if it later discovered that the EEOC’s paper files did not contain the full extent of its ESI.

**Edelstein v. Optimus Corp., 2012 WL 2192292 (D. Neb. June 14, 2012).** In a suit by former employees against the defendant corporation to recover benefits from its retirement plan, the court considered whether an email relating to the termination of the retirement plan was shielded from discovery by the work product doctrine, -attorney-client privilege, or both. Although the defendant’s email made reference to legal counsel and discussed issues surrounding the termination of the retirement plan, the court found that the email was not privileged. According to the court, it was not clear that the defendant had actually made the decision to terminate the plan at that time or that litigation resulting from termination of the plan was a real possibility. Thus, the defendant was ordered to produce the email.

**F.D.I.C. v. Malik, 2012 WL 1019978 (E.D.N.Y. Mar. 26, 2012).** The plaintiff moved for sanctions against the defendants for the destruction of emails and computers. The plaintiff argued the defendants breached their preservation obligation by allowing employees to delete unpreserved emails. The defendants countered that they did not preserve the emails because a technology vendor did not install a requested back-up system. The court determined that a hearing was necessary to determine the defendants’ state of mind surrounding the loss of the emails and concurrent destruction of computer hard drives. The defendants counter-moved for sanctions based on the plaintiff’s alleged destruction of an arguable relevant employee manual. The court denied the cross-motion as the defendant failed to establish any evidence from which the court could infer that the loss was prejudicial to the defendant’s case.

**Firestone v. Hawker Beechcraft Int’l Serv. Co., 2012 WL 899270 (D. Kan. Mar. 16, 2012).** The plaintiff brought suit against his former employer, alleging breach of contract and failure pay severance and other earned income. The defendant denied any obligation to pay the claimed compensation, accusing the plaintiff of acting in bad faith when it copied or removed confidential and proprietary information from the employer’s computer system prior his termination. The defendant successfully moved to compel

twelve USB drives identified by serial numbers. In response, the plaintiff produced eight USB drives, but only three matched the listed serial numbers. The defendant sought spoliation sanctions. Refusing to order sanctions, the court found no evidence to suggest that the plaintiff, prior to his termination, knew or should have known that any USB drive may be relevant to future litigation. Additionally, the court determined that six of the twelve listed devices were already in the defendant's possession and were, in fact, not USB drives. As to the four allegedly "missing" USB drives, the court found no evidence showing that the plaintiff had been the individual to attach the devices to his company-issued laptop.

**General Electric Co. v. Wilkins, 2012 WL 570048 (E.D. Cal. Feb. 21, 2012).** In this case arising from a disputed patent interest, the defendants sought an order compelling the plaintiff to use specific criteria to search 405 backup tapes used to store computer server content. The plaintiff alleged that the retrieval costs were prohibitive, while the defendants countered that the true cost was a fraction of the plaintiff's estimate. The district court denied the defendants' request because it concluded that the tapes were not reasonably accessible and that the defendants did not demonstrate "good cause" requiring the plaintiff to expend resources to make the tapes accessible. Specifically, the court found that the defendants did not show that there were likely responsive documents on the backup tapes that had not already been produced.

**GenOn Mid-Atl., LLC v. Stone & Webster, Inc., 2012 WL 1414070 (S.D.N.Y. Apr. 20, 2012), *aff'd*, 2012 WL 1849101 (S.D.N.Y. May 21, 2012).** In this declaratory judgment action involving a construction contract, the defendant moved for sanctions for alleged spoliation of ESI by the plaintiff's third-party consultant. After the plaintiff hired legal counsel, legal counsel hired the third-party consultant to assist with certain audits of the defendant's construction costs. The defendant then subpoenaed the consultant to produce various documents. Although the consultant provided several documents, the defendant filed a motion for sanctions against the plaintiff, alleging that the consultant had failed to produce certain emails. The court refused to order sanctions. Citing *The Sedona Conference*<sup>®</sup>, *Commentary on Legal Holds: The Trigger and The Process*, 11 Sedona Conf. J. 265 (2010), the court found that the defendant had failed to establish that the plaintiff had a "the legal right" to the consultant's documents. The court pointed to a provision in the retention letter between counsel and the consultant, stipulating that the consultant was retained by legal counsel only and that the plaintiff was merely responsible for paying the consultant's fees. The court, however, did find that the plaintiff had "practical control" over the consultant's documents, since there was "little doubt" that the consultant would have complied with a preservation request by the plaintiff. The court concluded that the plaintiff did have a duty to preserve the contractor's data, but took issue with the fact that the defendant had chosen to negotiate directly with the consultant and had excluded the plaintiff from many of the discussions. The court stated that the defendant was barred from complaining about the plaintiff's withholding of the consultant's documents, found no evidence of prejudice to the defendant, and denied the defendant's request for sanctions.

**Gonzalez v. Las Vegas Metro. Police Dept., 2012 WL 1118949 (D. Nev. Apr. 2,**



**2012).** In this action against a police department for the alleged violation of the plaintiff's civil rights arising out of a traffic stop, the plaintiff requested the production of any surveillance video in the defendant's possession depicting the plaintiff. The defendant responded that pursuant to its policy and procedure, video recordings were retained for one year only, unless special circumstances existed. The plaintiff sought sanctions against the defendant, claiming it willfully erased the recording after it was notified of the litigation and received a demand for preservation of the evidence from the plaintiff's attorney. The plaintiff believed she was entitled to a rebuttable presumption or permissive adverse inference instruction against the defendant for the destruction of video recording. Opposing the motion, the defendant argued that the plaintiff had failed to specifically request the recording and had failed to show that the recording contained relevant evidence. The defendant also asserted that a rebuttable presumption of spoliation was improper since the recording had been erased in good faith, pursuant to its standard operating policies. Although the court agreed that any available video evidence should have been preserved, it was not convinced that the plaintiff had been prejudiced by the destruction of the recording. Because the defendants had provided the names of the individuals appearing in the video to the plaintiff, the court reasoned that the plaintiff could have deposed them as an alternative and refused to order sanctions.

**Harkabi v. SanDisk Corp., 2012 WL 826892 (S.D.N.Y. Mar. 12, 2012).** In this breach of contract case relating to the sales of flash memory products incorporating the plaintiff's software, the defendant sought to exclude expert testimony because it claimed the expert had failed to disclose, among other things, records of his internet search history regarding his definition of the term "software." The expert testified that he searched on Google Scholar and found the definition on a government website after reviewing "maybe a dozen" definitions. The defendant asked to review the records of his searches to determine where the government website ranked in the Google Scholar results, but the expert answered that he had not preserved his search history. The court concluded that the expert's failure to preserve and disclose his internet search history was "not ideal," but relatively harmless. The court reasoned that the expert had not relied solely on Google searches to form his opinion and did not claim that the government website should be given more weight than some other authority because of its relative position in Google search results. Because the defendant ran its own searches on Google Scholar, the court noted that it could have used its search results to cross-examine the expert. Also, the court found no evidence that the expert had purposefully destroyed his internet search record. Finally, since the importance of the undisclosed information was "relatively minor," the court found that the prejudice suffered by defendant was negligible. Accordingly, preclusion of expert testimony was not warranted.

**Harper v. Caldwell County, 2012 WL 1088033 (W.D. Tex. Mar. 30, 2012).** In this wrongful termination case, the plaintiff sought an adverse inference instruction against the county, arguing that its failure to preserve a surveillance video constituted bad faith. The county admitted that it had not preserved a copy of the video, but denied bad faith, and claimed that its improper failure to preserve was merely due to negligence. The county further argued that, even if the video had been preserved, officer testimony established that its contents were inconclusive and irrelevant to the issues in the case.

Although the court acknowledged that the county may have violated its own policies by failing to preserve a copy of the video, it was concerned that legitimate questions existed regarding the video's relevance and even whether a copy of the video had ever existed in the first place. Finding no evidence of bad faith on the part of the defendant, the court denied the plaintiff's adverse inference request.

**Hudson v. AIH Receivable Mgmt. Services, 2012 WL 1194329 (D. Kan. Mar. 14, 2012), report and recommendation adopted as modified, 2012 WL 1215250 (D. Kan. Apr. 9, 2012).** In this employment discrimination action against her employer, the plaintiff sought sanctions for spoliation and also contended that the defendant's ESI searches were incomplete and improperly conducted by a non-certified IT consultant. With regard to spoliation, the plaintiff claimed that an employee of the defendant -- the one at the center of the discrimination dispute -- had continued to delete email messages for several months after the litigation hold had been put in place. Although the court concluded that the employee's conduct was merely negligent, it was satisfied that the destroyed e-mail could contain information relating to the plaintiff's claims. Thus, the court held that an adverse inference was appropriate. The court, however, was not willing to go so far as to strike the defendant's answer and affirmative defenses or order a monetary sanction. While the court was disturbed by the length of time the employee continued delete emails and the failure of defense counsel to explain the litigation hold to the employee, the employee's conduct was deemed unintentional and the availability of other evidence limited any resulting injury to the plaintiff. As to the consultant's conduct, the plaintiff asserted that the consultant had "blindly searched" computers within the arbitrary parameters imposed by the defendant's counsel, which did not include a search of "external media, discs, flash drives, external hard drives, cookies, images or metadata." The court was not convinced that this warranted sanctions. Because the parties failed to comply with the court's direction to confer about search methodology, the court found that the plaintiff had been complicit in any deficiencies in the defendant's ESI searches.

**Innospan Corp. v. Intuit, Inc., 2012 WL 1144272 (N.D. Cal. Apr. 4, 2012).** In this trademark infringement action, the court sanctioned the plaintiff for "relentless discovery violations" by granting default judgment on the defendants' counterclaim and dismissing the case in its entirety. The court found that the plaintiff willfully manufactured evidence, failed to cooperate, failed to pay sanctions in full and on time, and obstructed justice by manipulating testimony. Had the plaintiff paid a substantial amount of its sanctioned amount, the court noted that its balance would have been forgiven. However, the plaintiff had paid only 20% of the amount ordered and had indicated to the court that it could not pay the remaining amount (even after it was given eight additional months to make good on the balance). Thus, in light of the delay, costs, and prejudice to the defendants, the defendants were entitled to keep the amount already paid by the plaintiff.

**Kirschenman v. Auto-Owners Ins., 2012 WL 548857 (D.S.D. Feb. 21, 2012).** The plaintiffs in this breach of contract case moved to compel the defendant to produce a computer-generated report identifying policyholders of the defendant and electronic documents related to regulatory complaints. The defendant objected to providing the

names and contact information for its policyholders and alleged that the report may have been incomplete because some of the policyholders bought their policies from agents outside of the area. The defendant also argued that in order to determine whose claims related to property claims, it would have to manually review each claim. The district court granted the portions of the motion related to the ESI issues. The court rejected the defendant's argument because it did not see why the policyholders who did appear in the report could not be identified, as there were already orders to protect the policyholders' confidentiality. The court noted that as far as the documents related to regulatory complaints were concerned, the defendants did not demonstrate that those documents could not be sorted, and the plaintiffs offered to sort the files.

**Larsen v. Coldwell Banker Real Estate Corp., 2012 WL 359466 (C.D. Cal. Feb. 2, 2012).** The plaintiffs argued that “re-production” by defendant of over 9000 documents was necessary to address certain discrepancies in defendants’ production of documents, including missing emails. The court disagreed, holding instead that plaintiffs had failed to establish that such discrepancies had “prevented them in any way from obtaining information relevant to a claim or defense under F.R.C.P. 26(b)(1).” The court also reasoned that a “re-production” would violate the principles of proportionality as codified in Rule 26(b)(2)(C). Citing Principles 2 and 7 of *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed.2007), the court concluded that the burden and expense to the defendants in completely reproducing its entire ESI production far outweighed any possible benefit to the plaintiffs. Thus, the minimal discrepancies identified by the plaintiffs did not justify the cost of recreating the production.

**Lubber, Inc. v. Optari LLC, 2012 WL 899631 (M.D. Tenn. Mar. 15, 2012).** In this employment discrimination and wrongful termination action, the court considered two motions: the defendants’ motion for a protective order limiting the relevant time frame for additional electronic searches, and the plaintiff’s motion to compel discovery. The magistrate judge, who was “amazed” at the amount of money spent thus far and the “tit for tat” behavior of the parties, blamed the attorneys for “throwing gasoline on the fire” instead of “monitoring and moderating” the discovery process. The court denied the defendants’ motion, but ordered the parties to split the expenses related to materials not already produced. With regard to plaintiff’s motion to compel, the court noted that discovery should not be used as “a tool with which to bludgeon the other side into submission.” According to the court, when “the requesting party bears a part of the cost of producing what they request, the amount of material requested drops significantly.” Thus, the court ordered plaintiff to post a \$10,000 bond, prior to the defendants’ production of the requested documents, to protect the defendants if they were ultimately successful on the merits and entitled to costs.

**Moore v. Gilead Sciences, Inc., 2011 WL 5572975 (N.D. Cal. Nov. 16, 2011).** In this action for retaliatory discharge in violation of the False Claims Act, the defendant filed for dismissal and monetary sanctions, alleging that the plaintiff had destroyed more than 10,000 relevant documents by wiping them from his company-issued laptop computer. The plaintiff responded by issuing further discovery requests, from which the defendant

sought a protective order. The court, considering several requests, conditioned production of emails from backup tape on plaintiff paying the estimated \$360,000 in restoration and retrieval costs; denied the plaintiff's request for correspondence between the defendant and the Department of Justice on the related False Claims Act litigation; allowed the plaintiff's request for additional discovery regarding the defendant's discovery of the plaintiff's alleged spoliation; and granted the plaintiff access to certain hard drives of the defendant. Regarding a subsequent set of discovery requests, the court allowed the plaintiff's request for information on how the defendant obtained certain emails that it claimed the plaintiff had destroyed, but refused the plaintiff's request for all emails it alleges the plaintiff destroyed, as the request would be impossible to fully answer; and allowed discovery as to whether any other employees had faced disciplinary action for allegedly similar violations of the defendant's computer use or litigation hold policies. In a subsequent decision, **2012 WL 669531 (N.D. Cal. Feb. 29, 2012)**, the court considered the defendant's motion for dismissal and sanctions based on spoliation. The plaintiff argued that he had no duty to preserve the privileged contents of his laptop and that the litigation hold did not apply to the periods of time when he deleted documents. He also alleged that he did not and could not know that he was under a duty to preserve all documents and that the defendant received all relevant documents. The defendant argued that the plaintiff's spoliation prejudiced its ability to defend not only this action, but the related False Claims Act case. The court concluded that the plaintiff's spoliation was in bad faith and granted the defendant's sanctions in part, finding that sanctions were warranted and an adverse inference was proper.

**Navedo v. Nalco Chem., 848 F. Supp. 2d 171 (D.P.R. 2012).** The plaintiffs in this employment discrimination action moved the court to reconsider its grant of the defendants' motion for summary judgment and instead impose the sanctions that the plaintiffs proposed in their motion *in limine*. In that motion, the plaintiffs asked the court to prevent one of the defendants from presenting certain ESI as a result of alleged failure to produce ESI in discovery and spoliation of evidence. The defendants argued that the plaintiffs' request for emails was overbroad and that defendant company's policy was to keep emails on its server for no more than ninety days, thus not all of the emails were available. The plaintiffs countered that this discovery objection by the defendants was in bad faith. The district court magistrate denied the plaintiffs' motion, noting the plaintiffs' "procedurally incorrect and untimely" discovery objection.

**In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010, 2012 WL 85447 (E.D. La. Jan. 11, 2012).** The plaintiffs in this case sought company email correspondences from the defendants. The plaintiffs argued that the emails fell under the business records exception to the hearsay rule because they are the modern-day interoffice memoranda. They also asserted that the emails were admissible under the adoptive admissions, admissions by party opponent, and non-hearsay evidence rules. The defendants objected to the plaintiffs' blanket application of the rules and contended that whether the emails were admissible should be decided on a case-by-case basis. They further countered that in order for an email to be considered a business record, it must include information derived from the regular course of business. The district court ordered the parties to determine the admissibility of the emails and added

that the judges would not “do this work for the parties.” The court noted that in order for an email to be considered a business record, “[f]irst, it must have been the business's regular practice to make the record at issue...” and “[s]econd, the email itself must have been created as part of the regularly conducted activity of a business.”

**Omogbehin v. Cino, 2012 WL 2335319 (3d Cir. June 20, 2012).** The plaintiff filed suit against the Secretary of the Department of Transportation alleging race and national origin discrimination in violation of Title VII. Appealing from the jury verdict entered against him, the plaintiff claimed that the district court had erred in denying his motion for spoliation sanctions. The basis of the plaintiff's claim was the litigation-hold letter he had sent to the Secretary requesting preservation of all data “without deletions or tampering.” The Secretary produced the information, but it did not contain certain emails the plaintiff believed had been created during the relevant period. The plaintiff argued that the Secretary intentionally destroyed or suppressed relevant emails and voicemails created during this time. The magistrate judge denied the plaintiff's motion, as well as his motion for reconsideration, because of the plaintiff's failure to show that the emails were actually sent or received. On appeal, both the district court and Third Circuit agreed with the magistrate judge that the plaintiff had not satisfied his burden of establishing facts from which the court could “at least infer that the evidence existed in the first place.”

**Pippins v. KPMG, LLP, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011).** In this Fair Labor Standards Act action, the plaintiffs requested that defendant KPMG preserve the hard drives of present and former employees who were potential class members. KPMG moved for a protective order that would either shift the cost of hard drive preservation or limit the scope of preservation to a random sample of 100 hard drives from the more than 2,500 hard drives KPMG had already collected at a cost of more than \$1.5 million, against which the plaintiffs would be allowed to run keyword searches. The court, applying FRCP 26(c), attempted to balance KPMG's interest in avoiding the undue burden or expense that would result from its obligation to preserve the hard drives with its duty to preserve. KPMG argued that it had met this burden and advocated the proportionality principles of FRCP 26(B)(2). However, the court, citing *Orbit One Comm., Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436, n.10 (S.D.N.Y. 2010), cautioned that “[p]roportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.” Citing *The Sedona Conference*<sup>®</sup>, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289, 291 (2010) (Principle No. 1), the court ruled that even though the expense of hard drive preservation could eclipse the stake of the litigation, KPMG failed to be able to establish “conclusively” that the materials contained on the hard drives were either of ‘little value’ or ‘not unique.’ Instead, the court applied a three-part test to determine the scope of KPMG's preservation obligations: (1) the potential relevance of the information to be preserved; (2) whether the information to be preserved related to key players; and (3) the extent to which the information was duplicative or cumulative of that which has already been preserved. The court held KPMG had failed to provide information as to why the information contained on its

employees' hard drives would not be relevant to the litigation, denying the defendant's motion for a protective order without prejudice. The court further found that until plaintiffs' motion to certify this litigation as a class action was resolved, all of the potential class members could be found to be "key players". The court noted that even if the court denied plaintiff's certification motion, KPMG would still be obligated to preserve the hard drives, as it would be on notice of potential future litigation brought by the individual class members. In a subsequent decision, **2012 WL 370321 (S.D.N.Y. Feb. 3, 2012)**, following conditional certification of the plaintiff class, the District Judge held that the defendant's objections to the Magistrate Judge's ruling regarding preservation pending certification were now moot, and further its objections are overruled, stating that "I cannot conclude that the cost of preserving the hard drives outweighs its benefit, as KPMG urges, any more than Judge Cott could, because the record before me is devoid of information necessary to conduct such an analysis."

**Pouncil v. Branch Law Firm, 2012 WL 777500 (D. Kan. Mar. 7, 2012).** This was a legal malpractice action stemming from a Vioxx wrongful death claim in which the plaintiff estate was barred from recovery, allegedly because the defendant law firm mishandled the file. The plaintiffs sought the identity of everyone in the firm who had handled the file. The law firm named a few people, but it was apparent from the documents produced, including activity logs, that many others had been involved. The firm had produced only one email, and that had been obtained only after a non-party claims administrator produced it in response to a subpoena. The law firm apparently had instituted no litigation hold. Instead, during his deposition, the senior partner in the firm testified that the law firm did not have a formal document retention policy or take affirmative steps to ensure that all key employees preserved relevant evidence, including electronically-stored information. The court ordered the defendants to immediately issue a litigation hold and submit to a forensic examination of its computer systems by a third party under an agreed-upon protocol, with the allocation of costs to be determined. If the examination reveals that relevant evidence was not preserved, plaintiff would be granted leave to seek sanctions for spoliation.

**Poux v. County of Suffolk, 2012 WL 1020302 (E.D.N.Y. Mar. 23, 2012).** The plaintiffs in this case filed tort and constitutional claims against county law enforcement and Citibank for, *inter alia*, false imprisonment and malicious prosecution. The plaintiffs moved for sanctions based on the defendants' alleged spoliation of surveillance tapes. The Citibank defendants argued that per bank tape retention policies, tapes were recycled for recording after 60 to 90 days. The district court denied the plaintiffs' motion because no rational jury could conclude that the defendants knew or should have known that the plaintiffs might bring an action. The court further found that even if the defendants had an obligation to preserve the tapes, the plaintiffs provided no evidence that the tapes were relevant to the claims against the defendants, nor did the plaintiffs suffer prejudice because of the recycling of the tapes.

**Prestige Global Co. Ltd. v. L.A. Printex Indus., Inc., 2012 WL 1569792 (S.D.N.Y. May 3, 2012).** In this fashion copyright infringement case involving several discovery disputes, the defendant accused the plaintiff of engaging in spoliation of ESI. To recover

the allegedly deleted files, the defendant sought to submit the plaintiff's computer files to a forensic examination. The court denied the request due to the defendant's failure to establish that spoliation had actually occurred. According to the court, there was no evidence to suggest that the plaintiff deleted certain e-mails at a time when it had notice of or could have reasonably anticipated litigation. The garments at the heart of the copyright infringement dispute were for the 2008 and 2009 seasons, thus the court found that "any e-mails relating to them were in all likelihood deleted by the end of 2009." The court concluded that the defendant had no preservation obligation until March 2011 when the defendant became aware of the copyright infringement claim. Thus, the court ruled that no forensic examination was warranted. The court also added that designating a custodian as corporate representative does not impose a heightened duty upon the custodian to search for relevant ESI.

**Pringle v. Adams, 2012 WL 1103939 (C.D. Cal. Mar. 30, 2012).** In this music copyright infringement case, the defendants moved for summary judgment. They also alleged that the plaintiff's claims should be dismissed as a sanction for spoliation of the plaintiff's hard drives, which the defendants argued were relevant to disprove that the plaintiff's intellectual property rights were superior to the defendants' alleged rights. The defendants contended that the backup files that the plaintiff provided of the songs in question were insufficient because the plaintiff could have altered the creation date, and the only way to retrieve the true creation date was by imaging the plaintiff's hard drives. The district court granted the defendants' motion and found that dismissal was an appropriate sanction for the plaintiff's willful spoliation of evidence. The court concluded that the plaintiff was aware of his duty to preserve the hard drives, and the plaintiff demonstrated this awareness by copying some of the data from a hard drive and delivering it to his expert before sending it to a third party for repair.

**Race Tires America v. Hoosier Racing Tire Corp., 2011 WL 1748620 (W.D. Pa. May 6, 2011), reversed and remanded 2012 WL 887593 (3d Cir. Mar. 16, 2012).** At the trial court level, the plaintiff moved that for costs taxable under 28 U.S.C. §1920(4). The court awarded costs, noting that "the requirements and expertise necessary to retrieve and prepare these e-discovery documents for production were an indispensable part of the discovery process." This decision was in line with recent decisions by trial courts in several circuits, but the Third Circuit disagreed. Going back to the history of the cost statute, the court noted that Section 1920 is the modern codification of the Fee Act of 1853 and embodied the American "depart[ure] from the English practice of attempting to provide the successful litigant with total reimbursement." The court stated that "[t]he comprehensive scope of the [1853] Act and the particularity with which it was drafted demonstrated ... that Congress meant to impose rigid controls on cost-shifting in federal courts." Despite amendments in the 1940's and most recently in 2008 to modernize the language of the Act, it still narrowly defines the court's power to shift costs. Defining "exemplification" narrowly, the circuit held that "The electronic discovery vendors' work in this case did not produce illustrative evidence or the authentication of public records. Their charges accordingly would not qualify as fees for "exemplification..." Considering "copies," the circuit held that "scanning and conversion of native files to the agreed-upon format for production of ESI constitute "making copies of materials," but that

deduplication, keyword searching, and other computer processing did not. It remanded the case back to the trial court with instructions to greatly reduce the cost award.

**Reynolds v. Univ. of Pennsylvania, 2012 WL 1890398 (3d Cir. May 25, 2012).** The plaintiff filed suit against the university for, *inter alia*, breach of contract and fraud, alleging that he enrolled in a special master’s degree program in engineering management with the understanding that his degree would be from the Wharton School of Business, and not Penn Engineering, both of which are divisions of the University. In discovery, he produced a PowerPoint presentation and other electronic evidence from parallel litigation filed by another student with a similar complaint, evidence which turned out to have been fraudulent. The University requested that the plaintiff admit that the evidence was generated on a version of Adobe Acrobat that didn’t exist at the date the plaintiff alleged it was presented by the University, and featured a version of the Wharton logo that wasn’t adopted until a year later. The plaintiff refused the University’s request for admission, and the University deposed an executive of Adobe and developed other evidence to prove the inauthenticity of the plaintiff’s evidence, which it successfully offered at trial. The trial court imposed sanctions on the plaintiff under Rule 37 requiring him to pay the University’s attorney’s fees and costs incurred to prove the release date of software. The appellate court upheld the trial court’s sanctions order, holding that the evidence at issue was “substantially important” to the case, the plaintiff had no reasonable expectation of prevailing on his objection to the request to admit, and that no other good cause existed to justify the plaintiff’s actions.

**Salem Financial v. U.S., 2012 WL 171906 (Ct. Cl. Jan. 18, 2012).** In a complex dispute over the tax treatment of “Structured Trust Advantaged Repackaged Securities” transactions, the government challenged the plaintiff’s assertions of work product protection over tax reserve documents, as well as attorney-client and tax practitioner privileges. The court found that the taxpayer had effectively waived work product protection claims over the tax reserve documents by relying on the “advice of counsel” defense. It also found that the tax practitioner privilege, which “is largely coterminous with the attorney-client privilege,” had been effectively waived on the same grounds. As for the 390 documents asserted to be protected by the attorney-client privilege, the court directed that the parties negotiate a “quick peek” procedure to review the documents, citing the 2006 Advisory Committee Notes to Fed. R. Civ. P. 26(b)(2), and stating that disclosure under this procedure will not waive any privilege or protection the plaintiff has asserted in this case. The court then addressed three subcategories of documents containing non-legal advice, containing purely legal advice, and containing advice from a person acting in a non-legal capacity, providing analysis and instructions to the parties on how they are to identify and treat each category.

**Spanish Peaks Lodge, LLC v. Keybank National Association, 2012 WL 895465 (W.D. Pa. Mar. 15, 2012).** In a banking dispute, the defendant moved for spoliation sanctions against the plaintiffs, alleging that the plaintiffs implemented a document retention policy for the sole purpose of destroying litigation-related documents. The district court denied the defendant’s motion for spoliation, relying on *The Sedona Conference*<sup>®</sup> *Commentary on Legal Holds: The Trigger & The Process* to examine the



facts in the record and finding that the defendant did not provide evidence that the plaintiffs should have reasonably anticipated litigation.

**Stanfill v. Talton, 2012 WL 1035385 (M.D. Ga. 2012).** The father of pretrial detainee who died while in custody at a county jail brought a § 1983 claim individually, and as administrator of his son's estate, against various county employees. The county defendants moved for summary judgment and the father cross-moved for partial summary judgment. The father also sought spoliation sanctions, alleging that the defendants intentionally destroyed a jail video or allowed it to be destroyed to conceal events harmful to the defendants' case. As a sanction, the father asked the Court to draw an adverse inference regarding the missing video. While the court was unclear as to the degree of bad faith necessary to impose sanctions for spoliation of evidence in civil actions, the court concluded that simple negligence is not enough and actual malice is not required. In this case, the court found that the plaintiff had failed to establish that the county defendants had duty to preserve any video of detainee in his cells, as would support spoliation sanctions; the defendants did not anticipate litigation resulting from detainee's death, the plaintiff did not file suit until almost two years after detainee's death, and there was no indication that the plaintiff requested a litigation hold or provided the defendants with any form of notice that litigation was contemplated until the lawsuit was actually filed. Even if county defendants had duty to preserve the video, the court found that the father failed to establish that such duty was owed to him. According to the court, mere investigation into the detainee's death, which apparently was routine procedure following in-custody death, did not necessarily mean that the defendants should have anticipated litigation with the plaintiff, nor did it mean that the plaintiff could take advantage of a duty to preserve evidence, which if there was one, was owed to the state's bureau of investigation.

**Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc., 2012 WL 1067664 (W.D.N.Y. Mar. 22, 2012).** The plaintiffs brought breach of contract and tort claims, and one plaintiff moved for sanctions, alleging that the defendant failed to preserve email communications. That plaintiff argued that the defendant only provided email duplicates and should have preserved employee computers related to the contractual agreement in question. The defendant contended that the emails were corrupted and unreadable and, additionally, it changed its archival methods and consequently may have lost emails. The magistrate judge granted the plaintiff's spoliation motion in part and denied it part. The court explained that the defendant could not have reasonably anticipated litigation before the filing date of the complaint and, therefore, could not be responsible for emails lost prior to the filing date. However, the court found that at no point did the defendant institute a litigation hold, which the court concluded constituted gross negligence. The magistrate judge declined to issue severe sanctions because the defendant's actions did not constitute bad faith and he did not find that the plaintiff suffered prejudice from the loss of the emails, as the plaintiff did not prove that relevant internal emails ever existed or that the defendant destroyed them. The court did require the defendant to pay reasonable attorney's fees and costs.

**State Nat. Ins. Co. v. County of Camden, 2012 WL 960431 (D.N.J. Mar. 21, 2012).** In

an insurance dispute relating to a motorist's injuries on a county road, the plaintiff insurer claimed that the county's failure to issue a litigation hold to disable its automatic email deletion program and to preserve copies of the backup tapes constituted a failure to preserve its ESI. The court agreed. Although the magistrate judge found insufficient evidence that certain emails were "missing" to support an adverse instruction, the court held that the county's gross negligence did warrant the imposition of reasonable attorneys' fees and costs incurred by the plaintiff in investigating the county's email production. The county appealed the decision, arguing that sanctions were improper since its failure to issue a litigation hold did not result in actual spoliation. The court upheld the decision to compensate the plaintiff for the county's failure to preserve, despite the concrete proof of spoliation.

**Tetsuo Akaosugi v. Benihana Nat. Corp., 2012 WL 929672 (N.D. Cal. Mar. 19, 2012).** In this class action suit involving an employment dispute, the employer defendant sought spoliation sanctions against an individual plaintiff employee. Specifically, the defendant requested monetary sanctions, the dismissal of the plaintiff's claims, his removal as the proposed class representative, and the return of all fruits of his alleged "self-help discovery." The defendant claimed that the employee gave false testimony and deleted company data from a USB drive. The court found that the deletion of files from the USB drive had not hampered the defendant since the employee had never deleted files from the company computer. Further, the court noted that the former employee was free to delete a file prior to returning the USB drive to his employer when the file was not the subject of a clear document request. Finally, the court concluded that it was "hard to tell" whether the employee's deletion was wrongful since copying large amounts of files was part of his job. Accordingly, the defendant's motion was denied.

**Tracy v. NVR, Inc., 2012 WL 1067889 (W.D.N.Y. Mar. 26, 2012).** In this class action against a public corporation seeking damages relating to an alleged failure to pay overtime under the Fair Labor Standards Act, the plaintiffs moved to compel the defendant's litigation hold letters, as well as a list of employees who received the letters. In its request, the plaintiff did not allege that the defendant had spoliated any evidence. The plaintiffs sought to demonstrate that the defendant had failed to preserve evidence related to potential opt-in plaintiffs. The court agreed that the defendant had a duty to preserve documents in question, but that this duty did not extend to evidence relating to potential opt-in plaintiffs at the inception of the lawsuit. The judge observed that "[a]s in any case raising issues of spoliation, the court's determination of the scope of the duty to preserve is a highly fact-bound inquiry that involves considerations of proportionality and reasonableness." The court found noteworthy the fact that the plaintiff waited over two years after filing suit to move for conditional class certification. The court concluded that, even if NVR had a duty to preserve documents relating to potential opt-in plaintiffs from the inception of litigation, the plaintiffs had failed to demonstrate that the documents had been lost or destroyed, or even relevant to the litigation. Therefore, the plaintiffs' motion to compel was denied. In response to the defendant's motion for spoliation sanctions against an opt-in plaintiff who shredded original documents after she joined the lawsuit, the court concluded that the opt-in plaintiff was grossly negligent in destroying these documents and the appropriate

sanction was to preclude her from testifying about her daily work activities.

**Trilegiant Corp. v. Sitel Corp., 2012 WL 1883343 (S.D.N.Y. May 22, 2012).** In this breach of contract and negligence action, the court found that the defendant failed to supplement discovery and directed the production all non-privileged documents responsive to the plaintiff's motion to compel. The court, however, did not order payment of the expenses incurred by the plaintiff in bringing its motion to compel. The court reasoned that if the plaintiff had met and conferred in good faith with the defendant prior to filing its motion, "there would likely have been no need for the motion for which [it] sought reimbursement." Finally, the court warned that any future discovery disputes required strict compliance with the FRCP and failure to do so would be considered evidence of bad faith.

**Tucker v. Am. Int'l Group, Inc., 281 F.R.D. 85 (D. Conn. 2012).** A former employee sued to collect damages from the defendant insurers relating to judgment entered in her favor against her former employer. The plaintiff moved to compel inspection of electronic records in the possession of a non-party insurance broker and sought costs for performing inspection. After the broker produced several hundred responsive documents, the plaintiff claimed that certain emails were missing. The broker objected on the grounds that the plaintiff's claim that certain emails were missing was based purely on speculation. The broker also maintained that the plaintiff's computer had been repurposed after her termination pursuant to company policy. Citing *Zubalake*, the court held that the burden imposed on the non-party broker by ordering inspection of the electronic records outweighed the speculative benefits to the plaintiff. The court reasoned that the plaintiff's request for computers, records, policies, and system information was overly broad. Further, the court doubted that the records even existed since it was based only on the plaintiff's unsubstantiated belief that the broker had omitted production on two earlier occasions. Next, the court found the plaintiff's request was cumulative, in that the plaintiff had already obtained extensive discovery from other sources. Finally, the recovery of records would be unduly burdensome in that it would necessitate restoring mirror images from 83 computers, building a new server to hold the images, the disruption of business for several weeks, and the risk of disclosure of its proprietary business information.

**United Cent. Bank v. Kanan Fashions, Inc., 2012 WL 1409245 (N.D. Ill. Apr. 23, 2012).** Plaintiff alleged that defendants breached four loan agreements and sought damages in excess of \$26 million. Discovery of the defendants' ESI proved difficult. Defendants claimed that they maintained ESI on a warehouse server, but the plaintiff received notice from the defendants' former counsel that defendants did not have access to or control of the warehouse server because the warehouse was foreclosed upon and now owned by an outside party. Information on the server was directly related to the plaintiff's claims as well as defendants' counterclaims. The court found that there was strong circumstantial evidence that defendants orchestrated the "sale" of the server and went through great lengths to hide their participation, and granted the plaintiff's motion for sanctions as well as its petition for \$332,929.34 in fees and costs.

**U.S. v Coffeyville Resources Refining & Marketing, LLC, 2012 U.S. Dist. LEXIS 5523 (D. Kan. Jan. 18, 2012).** In a complex environmental cleanup case, the court received the parties' joint report of their Rule 26(f) discovery planning conference, and framed a detailed order based on the agreements contained therein, also ruling on the points of disagreement noted in the report. The order closes with the following observations regarding proportionality and costs: "[T]o avoid getting bogged down with overly broad requests and frivolous objections, the parties and counsel should bear in mind that the court intends to strictly enforce Fed. R. Civ. P. 26(g). *See also Mancina v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 355-65 (D. Md. 2008). Hopefully Rule 26(g) alone will serve as sufficient disincentive for either party to make any unduly broad or disproportionate requests for ESI that will result in undue expense. If it does not, then of course the objecting party is free to file a timely (early) motion asking the court to rein in the specific discovery in question as disproportionate. *See Fed. R. Civ. P. 26(b)(2)(C)*. In any event, the parties and counsel are forewarned that some or all of the costs of ESI discovery may, under 28 U.S.C. § 1920(4) and Fed. R. Civ. P. 54(d)(1), be taxed against the losing party at the conclusion of this case. [citations omitted] The court therefore expects that each party will work to ensure that costs are kept in check by taking a reasonable and targeted approach to e-discovery, lest it be the one taxed on the full amount of the bill."

**United States v. Daugerdas, 2012 WL 92293 (S.D.N.Y. Jan. 11, 2012).** The defendant moved to unseal an email produced to him by his former employer, who asserted that it was covered by attorney-client privilege and the attorney work-product doctrine. The court had ordered the document to be produced in discovery under Evidence Rule 502(d). The court denied the defendant's motion, as the defendant intended to use the email in a private arbitration proceeding, and its production under a Rule 502(d) order did not constitute a waiver of privilege that would allow it to be used in another action.

**U.S. v. Honeywell International, Inc., 2012 WL 974777 (D.D.C. Mar. 22, 2012).** The U.S. brought an action against the defendant under the False Claims Act. The defendant moved for sanctions, arguing that it had been prejudiced by the Department of Justice (the "Department") because the Department failed to preserve electronic data and did not meet its electronic discovery obligations. The Department countered that that it provided a large sum of data and implemented litigation holds. Furthermore, the Department argued that it cured any deficiencies in discovery when it became aware of them and that the defendant could not establish that it was prejudiced by those deficiencies. The court denied the defendant's motion, finding that sanctions would be premature, as discovery was far from complete and more evidence would be produced. Finally the Magistrate Judge recommended to the District Judge that further discovery in this case be closely supervised by the court to avoid further distractions and delays.

**U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc., 94 A.D.3d 58, 939 N.Y.S.2d 395 (N.Y. App. Div. 2012).** This case arose out of the mortgage crisis. GreenPoint was involved in originating "no documentation" mortgages and bundling them into securities, which it sold to GMAC, which in turn sold them to Lehman Brothers. In the ensuing litigation, GreenPoint, which was now a bankrupt shell entity,

moved to stay discovery until the plaintiffs agreed to pay the costs of searching and locating potentially millions of responsive documents from its ESI sources. The trial court held that the rule in New York was that requesting parties pay the cost of production, but not the cost of attorney review for privilege and relevance. The appellate court reviewed the somewhat confused jurisprudence on discovery cost allocation in New York and decided instead to adopt the *Zubulake* standard that producing parties ordinarily bear their own costs, and that there was nothing on the record to support any of the seven *Zubulake* factors that might justify cost-shifting.

**U.S. ex rel. Berglund v. Boeing Co., 2012 WL 1902599 (D. Or. May 24, 2012).** Finding that the plaintiff altered and deleted emails and destroyed three hard drives, the court dismissed the plaintiff's Third Amended Complaint and allowed the defendant to file a Statement of Costs. The plaintiff then asserted that fees sought by defendant were excessive and unsupported. The court granted in part and denied in part the defendant's Statement of Costs, finding that defendant was entitled to certain fees on the grounds of plaintiff's misconduct. The court found an appropriate apportionment of the hours in regards to the altered emails and destruction of the hard drives, but declined to apportion travel costs and costs pursuant to defendant's summary judgment motion.

**Vanliner Ins. Co. v. ABF Freight Sys., Inc., 2012 WL 750743 (M.D. Fla. Mar. 8, 2012).** The moving party and respondent were co-defendants in this negligence case. The moving party moved for spoliation sanctions against the responding party for failing to download data that was subsequently destroyed. The responding party moved for sanctions, alleging that the moving party's motion was "frivolous and baseless." The responding party argued that it hired an independent party to download data and that the loss of information was the independent party's fault for not using software that did not automatically save information. Further, the responding party contended that it provided the moving party with all of the information that the independent party downloaded. Finally, the responding party contended that it did not anticipate a lawsuit at the time. The magistrate judge denied the spoliation motion since there was no evidence that the responding party had notice of the negligence claim at the time of the data download, and because the moving party failed to prove the elements of spoliation.

**Widmar v. Sun Chem. Corp., 2012 WL 1755746 (N.D. Ill. May 16, 2012).** The defendants moved for sanctions alleging the plaintiff destroyed evidence regarding his post-termination salary when he deleted the personal email account he used during his employment. The plaintiff argued he changed his email address for innocent reasons pertaining to new job searches and did not know the emails would be destroyed until discovery. The plaintiff further argued the defendants suffered no prejudice because he produced relevant tax records and income receipts for the years in question. The court granted in part and denied in part the defendants' motion for sanctions, finding that the defendants were prejudiced in their ability to present evidence of mitigation and to refute the plaintiff's evidence of damages. The plaintiff would not be allowed to testify or present evidence pertaining to job applications or related activity before March 2010. In a separate discovery dispute, the defendants moved for civil contempt and sanctions because the plaintiff allegedly violated a protective order. In 2009, employees of Sun

Chemicals circulated a confidential email regarding problems with a particular product. The defendants provided the email, and a list of customers who used the product, during discovery. The plaintiff's counsel contacted several customers on that list. The plaintiff and counsel argued no improper information was disclosed during the conversations with customers. The court denied the defendants' motion for civil contempt and sanctions, finding that the plaintiff and his counsel did not violate provisions of the protective order.

**Wynmoor Community Council, Inc. v. QBE Ins. Corp., 2012 WL 716480 (S.D. Fla. Mar. 5, 2012).** In this breach of contract case, the defendant moved to compel production and forensic examination. The defendant alleged that the plaintiffs failed to provide "a single piece of electronically stored information." The defendant also argued that the plaintiffs implemented a planned "change-out" of the plaintiffs' computer system that risked loss of data. The plaintiffs countered that the defendant had unfettered access to the data and that if required to produce the ESI the defendant requested, they would suffer a burden that would outweigh any speculative benefit. The district court granted the defendant's motion, opining that – based on the record – the plaintiffs will do nothing to produce ESI until faced with a motion to compel. However, the court ordered a detailed protocol to minimize the intrusiveness and cost of the forensic examination.

## **Supplement**

### **Selected 2012 State Court E-Discovery Decisions**

**5 Star Diamond, LLC v. Singh, 369 S.W.3d 572 (Tex. App. 2012).** In a suit by landlords against a tenant, the appellate court reviewed the trial court's decision to strike the landlords' pleadings and order monetary sanctions against them for discovery abuses. The plaintiffs maintained that the choice of sanctions was arbitrary and unreasonable. The appellate court found the sanctions appropriate, citing the plaintiffs' repeated failure to comply with discovery requests and orders, even after lesser monetary sanctions had been imposed on the plaintiffs. The appellate court agreed that as a result of the plaintiffs' conduct, the defendant was deprived of evidence essential to refute the plaintiffs' claims and to present its own counterclaims.

**Barnett v. Simmons, 278 P.3d 8 (Okla. Civ. App. 2012).** In this breach of contract case, the plaintiff was found to have violated a court order and spoliated evidence by allowing his computer to be repaired to remove viruses, malware, and spyware while litigation was pending. The plaintiff dismissed the action, but the trial court retained jurisdiction to adjudicate the discovery sanctions. The defendants moved for attorneys' fees and costs related to their spoliation claims, which the trial court denied, finding that the plaintiff was substantially justified in his actions and a further sanction would be unjust, noting that the plaintiff's actions did not result in the loss of files relevant to the litigation and that the hard drive was destroyed while in the custody of the court-appointed computer expert. The defendants appealed. The appellate court upheld the trial court's decision, finding no abuse of discretion by the trial court. Specifically, the appellate court noted there was considerable dispute regarding the "interpretation of the logs on [the plaintiff's] computer and the programs which were used, installed, removed, and claimed to have caused an infection of the computer hard drive or to have allowed access."

**Collins v. Anchor Senior Med. Services PLLC, 2012 WL 1314142 (Mich. Ct. App. Apr. 17, 2012).** In this sexual harassment suit, the trial court granted default judgment in favor of the plaintiff on the ground that the defendant had violated court orders requiring it to produce emails. On appeal, the defendant relied on the doctrine of laches and argued that a significant amount of time had passed between the trial and the renewed motion for default judgment. The defendant also asserted that even if the default judgment on liability was proper, it was nonetheless entitled to a trial to determine damages. The appellate court affirmed the decision in part and denied it in part. The court rejected the defendant's laches argument, citing the delay caused by the defendant when it declared bankruptcy. However, the court agreed that the defendant was still entitled to a trial to determine damages.

**Davis v. Barkaszi, 424 N.J. Super. 129 (N.J. App. Div. 2012).** The plaintiffs in this dram shop action moved for review of the taxation of costs. The defendant argued that

the trial court improperly instructed the jury that it spoliated video surveillance evidence. The defendant alleged that the surveillance system could not record to DVD or VHS, and it also argued that no duty to preserve arose and, therefore, no spoliation occurred. The plaintiff countered that the defendant had a duty to preserve the footage because it was aware of its importance. The court reversed the trial court's holding and found that the trial court erred in its instruction to the jury. The court reasoned that the plaintiff did not make a threshold showing of the defendant's improper destruction of the footage, and the trial court did not permit the jury to hear why the defendant failed to preserve the surveillance footage.

**Frazier v. Burlington N. Santa Fe Corp., 811 N.W.2d 618 (Minn. 2012), as modified (Apr. 19, 2012).** In this wrongful death action against a train owner and operator, the plaintiffs sought sanctions for the alleged spoliation of electronic evidence. The district court granted the plaintiff's request, instructing the jury that "some of the original evidence, for example, the blueprints of the crossing circuitry, ... should have been preserved." The defendant filed a motion for a new trial, arguing that by labeling the missing blueprints as an "example" of the defendant's failure to preserve evidence, the jury instruction "unjustifiably expanded the inference that could be drawn" to the defendant's "severe detriment." The district court disagreed. Noting the court's considerable discretion in choosing the language of jury instructions, the court found that the instructions were supported by clear and convincing evidence of the defendant's negligence. The appellate court affirmed, noting that it would not reverse "simply because a litigant preferred to use other language."

**Juror No. One v. Superior Court, 206 Cal. App. 4th 854, 142 Cal. Rptr. 3d 151 (2012).** Following a guilty verdict in a criminal trial, the court was alerted that a juror, "Juror Number One," had posted comments on his Facebook page during trial, including one post about the evidence as it was being presented. During a hearing over the matter, the juror acknowledged he had posted on Facebook during trial, but claimed he had merely commented the fact that he was still on jury duty and had not discuss the case itself or the evidence. After the defendants subpoenaed Facebook to produce all the postings made by the juror during trial, Facebook moved to quash the subpoena. Facebook asserted that disclosure would violate the Stored Communications Act (SCA) and could otherwise be obtained from the juror himself as the "owner" of his account. The defendants then obtained a court order, requiring the juror to execute a consent form authorizing the release of his posts for in camera review. The juror objected, arguing that the order violated the SCA, the Fourth and Fifth Amendments, and his state and federal privacy rights. Finding the SCA inapplicable, the court concluded that the juror had failed to provide the court with enough detail to determine whether his posts were protected, such as the privacy settings on his account and therefore failed to establish a violation of his constitutional or statutory privacy rights. Even assuming that the posts were protected by law, the court added that there was no bar on forced disclosure since "the compulsion [was] on Juror Number One, not Facebook." A concurring judge agreed that the balance between the juror's privacy concerns and the defendants' right to a fair trial tipped in favor of the defendants, but emphasized that "[c]ompelled consent is not consent at all" and is "inconsistent with the spirit and intent of the protections in the



SCA.”

**Lake Vill. Health Care Ctr., LLC v. Hatchett ex rel. Hatchett, 2012 Ark. 223 (2012).** In a suit alleging abuse and neglect by a nursing home, the defendant argued that the trial court abused its discretion in striking part of its answers as a sanction for failing to produce emails during discovery. The trial court stated that it chose to strike part of the defendant’s answer, instead of granting a continuance, because the defendant failed to provide any assurances as to when the emails would be forthcoming. The defendant filed a motion to reconsider and requested a continuance, asserting that it should not be required to produce the emails as they were protected by attorney-client privilege. The defendant also insisted that “it was impossible to provide two months’ or a year’s worth of email data in fourteen days.” The trial court denied the motion. According to the court, it gave the defendant the opportunity to support its good-faith claim of compliance, yet the defendant invoked attorney-client privilege. The appellate court affirmed. The concurring opinion agreed with the result, but expressed concern that the majority was “leaving the impression that striking an answer is a common sanction for discovery violations.”

**Maese v. Tooele Cty., 2012 WL 592732 (Utah App. Ct. Feb. 24, 2012).** The Utah Appellate Court upheld the decision of a state agency and state trial court, holding that a request under Utah’s Government Records Access Management Act (GRAMA) for a county’s entire property transaction database in electronic format (or, in the alternative, a 20-year “compiled transaction report”) was properly denied. The court first held that the question of whether the database itself constituted a “public record” was a question of law, not one of fact on which discovery would be allowed, and deferred to the County’s determination that production of the database in its entirety or the creation of a copy was outside the scope of GRAMA. Secondly, the court held that providing access to the database during regular business hours satisfied the county’s obligations under GRAMA. The court recognized that providing access would require the plaintiff to expend more time and might require the plaintiff to reconstruct metadata from images of the source documentation, but held that under the version of GRAMA in effect at the time of the request, the form of disclosure was within the County’s discretion. In a footnote, it left open the question of whether subsequent amendments to GRAMA would require the County to provide the plaintiff with a copy of the database, if it is determined to be a public record.

**U.S. Bank N.A. v. GreenPoint Mtge. Funding, Inc., 939 N.Y.S.2d 395 (N.Y. Sup. Ct. App. Div. Feb. 28, 2012).** This case arose out of the mortgage crisis. GreenPoint was involved in originating “no documentation” mortgages and bundling them into securities, which it sold to GMAC, which in turn sold them to Lehman Brothers. In the ensuing litigation, GreenPoint, which was now a bankrupt shell entity, moved to stay discovery until the plaintiffs agreed to pay the costs of searching and locating potentially millions of responsive documents from its ESI sources. The trial court held that the rule in New York was that requesting parties pay the cost of production, but not the cost of attorney review for privilege and relevance. The appellate court reviewed the somewhat confused jurisprudence on discovery cost allocation in New York and decided instead to adopt the

*Zubulake* standard that producing parties ordinarily bear their own costs, and that there was nothing on the record to support any of the seven *Zubulake* factors that might justify cost-shifting.

**VOOM HD Holdings, LLC v. Echostar Satellite, L.L.C., 939 N.Y.S.2d 321 (2012).**

In this contract dispute, the Appellate Division upheld the trial court's imposition of an adverse inference against the defendant for spoliation of ESI. The plaintiff television production company filed suit claiming that the defendant satellite television distributor manufactured a pretext to declare a breach of contract to supply television content to the satellite company. The court cited a number of emails and other electronic documents dated in the six months leading up to the filing of suit indicating clearly that the defendant was looking for grounds to terminate the contract and that termination would likely result in litigation. However, the defendant took no action to preserve documents and ESI until four days after suit was filed by the plaintiff and did not suspend its 7-day email destruction policy until four months after filing. The emails cited by the court were obtained by the plaintiff from "snapshots" of certain defendant executives' email boxes taken in connection with other litigation and never produced by the defendant. Citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D. N.Y. 2003), *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), and *The Sedona Conference*<sup>®</sup>, *Commentary on Legal Holds: The Trigger and The Process*, 11 Sedona Conf. J. 265 (2010), the Appellate Division held that the duty to preserve potentially discoverable ESI and other documents is triggered by the reasonable anticipation of litigation, not by actual filing, and it is not suspended by any pre-litigation settlement negotiations. The Appellate Court went on to hold that parties are under an obligation to institute a "litigation hold" and take affirmative steps to halt the routine destruction of potentially discoverable ESI in electronic information systems. The Appellate Court agreed with the trial court's finding that the defendant acted in bad faith in failing to preserve relevant ESI, and that an adverse inference instruction – under which the element of prejudice to the plaintiff is rebuttable – was an appropriate sanction, recognizing that the plaintiff still had other evidence to prove its claims, and falling short of a dismissal of defenses or default judgment.